***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-7386

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

No. 75-7386

P/S

IN RE MASTER KEY ANTITRUST LITIGATION

(ALL CASES)

M.D.L. Docket No. 45

On Appeal From The United States District Court
For The District Of Connecticut
Honorable M. Joseph Blumenfeld, Judge Presiding

# BRIEF OF PLAINTIFFS-APPELLEES CITY OF PHILADELPHIA AND AMHERST LESING CORPORATION



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# I N D E X

BRIEF OF PLAINTIFFS-APPELLEES
CITY OF PHILADELPHIA AND
AMHERST LEASING CORPORATION

TABLE OF CASES

## INTRODUCTION

This Reply Brief, submitted by national class representatives-plaintiffs City of Philadelphia and Amherst Leasing Corp., is in response to the merits of defendants' appeal, in the event this Court should decide to accept review. Previous briefs filed with the Court address themselves to the issues of appealability and the arguments will not be reiterated herein.

It must be made clear at the outset that every argument advanced by appellants in this appeal is for the purpose of defeating the class action. The benefits to be gleaned by appellants from their position is clear -- a denial of these class actions effectively shields them from substantial liability. This result would be achieved because of the following circumstances:

1) no one in the chain of distribution of master key systems or contract hardware has commenced suit except the present classes -- governmental entities and private builder-owners.

2) The applicable statute of limitations has expired as to the claims of non-class members*/, i.e., contractors, distributors, subcontractors, etc.

3) Accordingly, the members of the present classes are the only entities who still have viable claims against these defendants.

Because of these circumstances, appellants have attacked every procedure adopted by the District Court for the purpose of promoting and assuring manageability and the fair and efficient adjudication of these class actions. Accordingly, appellants oppose:

(a) the class action;

(b) the separate trials of the liability and damage issues;

(c) the transfer, under 28 U.S.C. §1404(a), of all cases to the District of Connecitcut for trial; and

(d) the consolidation for trial.

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*/ Four Government suits were filed in 1969. Three were settled by consent decrees in 1969-70. The fourth, against Eaton Corp., was tried and resulted in a judgment of liability on March 2, 1972, reconsideration denied on April 27, 1972. Thus, the statute of limitations expired either four years from 1969, or one year after April 27, 1972, whichever is later.

Ironically, each of the four aforementioned procedures could accrue to the benefit of appellants:

(a) if appellants prevail at the liability trial, the class action will provide them with res adjudicata protection against all class members who did not exclude themselves. City of New York v. General Motors Corp., 60 F.R.D. 393 (S.D.N.Y. 1973); PASA v. General Adjustment Bureau, 64 F.R.D. 35 (S.D.N.Y. 1974); In Re Penn Central Securities Litigation, 347 F. Supp. 1327 (E.D.Pa. 1972).

(b) if appellants prevail on the liability issues, they will not be required to expend the time and expense of defending the damage issues. Lo Cicero v. Humble Oil & Refining Co., 52 F.R.D. 28, 30 (E.D. La. 1971).

(c) and (d): consolidation and transfer of all the cases means that appellants have to defend only one lawsuit and this avoids for them multiple litigation.

Indeed, it is often the parties defendants who move for transfer and consolidation of cases and for the separate trial of liability and damage issues.

Likewise the District Court's time and efforts are utilized in a most efficient and non-wasteful fashion as a result of the rulings below.

## QUESTIONS PRESENTED

1. Whether the district court's interlocutory order re-affirming the earlier certification of class actions in private antitrust cases and consolidating all cases for trial of common liability issues is appealable under 28 U.S.C. §1291.

2. Whether, if the order is appealable, the district court abused its discretion in determining that the cases met the requirements of Rule 23 in that the cases are manageable and that common issues predominate.

3. Whether, if the order is appealable, the district court abused its discretion in structuring the manageability of the class actions by ordering the issues of liability to be tried separately from the issues of damages and by consolidating all cases for trial of the common liability issues.

## ARGUMENT

### A. THE CLASS ACTION DETERMINATION SHOULD NOT BE DISTURBED

#### (1) This Court's Scope of Review of the District Court's Class Action Determination Is Very Narrow

To the extent, if any, the class action determination by the District Court is presently reviewable, the scope of review is very narrow. As this Court has held, the issue of the class action should be decided " *** in a practical and realistic way by a trial judge who has knowledge of the actual problems presented in the courtroom ***". City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969). When the trial judge has so acted, his judgment "*** should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation." Id. at 298. And the Court concluded:

> "*** he [the trial judge] should be afforded the greatest latitude in the exercise of his judgment after a careful factual exploration as to how this result [fair and efficient adjudication] can be attained." Id. at 300.

(2) The Trial Court Did Not Abuse Its Discretion In Denying Defendants' Motion To Reconsider The Earlier Class Determination

The class action issues came before Judge Blumenfeld on a motion for reconsideration of Judge Wood's earlier determination in the City of Philadelphia and Amherst Leasing cases (App. 22A) prior to their transfer to the District of Connecticut by the Judicial Panel for Multidistrict Litigation. As a result, in the cases sub judice, the trial court ruled on the class action late in the proceedings, after substantial discovery had been concluded. Moreover, he had previously passed upon appellants' motion for summary judgment, which pinpointed many of the factual issues relating to both causation and damages to be resolved at trial. Therefore, Judge Blumenfeld's ruling on the class action issue was made with "knowledge of the actual problems presented in the courtroom"*/, after he had "canvassed the factual aspects of the litigation"*/ and after he had made a "careful factual exploration as to how"*/ the fair and efficient adjudication of these class actions could be attained.

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*/ City of New York v. International Pipe & Ceramics Corp., supra, 410 F. 2d at 298, 300.

Accordingly, based upon his extensive and intimate knowledge of the factual and legal issues involved in these cases, the trial judge exercised his discretion as to whether he, as the trial judge, could efficiently and fairly preside over and manage these cases at trial as class actions. Moreover, his decision as to manageability was fortified by his presiding over the pretrial proceedings of these cases which he characterized as "smooth conduct of the extensive and complex pretrial proceedings to date." (App. 159A). Having so exercised his discretion in this manner, the trial court's judgment should not be disturbed.

Appellants do not and cannot point to any abuse of discretion on the part of the trial judge. Indeed, even in their "statement of issues presented", appellants do not charge the trial court with an abuse of discretion. Rather, they charge that the trial court "err[ed] in certifying national and state-wide classes", the incorrect yardstick for appellate review.

While appellants may disagree with the way in which the trial court exercised its discretion in ruling on the class action issues, their dissatisfaction does not constitute an abuse of discretion. Therefore, the ruling should not be disturbed.

B. THE DISTRICT COURT DID NOT ERR IN RULING THAT A JURY MAY CONCLUDE THAT APPELLANTS' ANTITRUST VIOLATIONS CAUSED INJURY TO EACH PLAINTIFF

Appellants' lengthy argument on the "fact of injury" issue totally ignores the actual holding in the court below and accordingly is irrelevant. Appellants' argument assumes that the court below concluded that the jury MUST find "causation" if it finds that appellants in fact violated the law. That assumption is erroneous. Moreover, appellants assert that the district court will not require "causation" to be established by each plaintiff. This assertion is erroneous.

All that the district court held was that:

> "If the plaintiffs introduce proof ... at the liability stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supracompetitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff."(App. 155A, n.3) [Emphasis added].

The district court's conclusion that a jury may infer causation as the natural consequences of defendants' antitrust violations complies with the Supreme Court's decisions on these issues. Story Parchment Co. v. Paterson Parchment Paper Co. 282 U.S. 555 (1931); Bigelow v. RKO Radio

Pictures, 327 U.S. 251 (1946), Reh. den., 327 U.S. 817 (1946); Continental Ore Company v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); and Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

In Story Parchment, supra, the Court applied to antitrust actions the rule of tort law that:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, *** it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." 282 U.S. at 563.

In Bigelow v. RKO Radio Pictures, Inc., supra, the Supreme Court expanded its Story Parchment ruling to apply to "causation" or "fact of damage". Therein the Court held:

> "*** in the absence of more precise proof, the jury could conclude as a matter of just or reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business *** that defendants' wrongful acts had caused damage to plaintiffs." 327 U.S. at 264. [Emphasis added].

The Court in Bigelow concluded that "the evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action ***", 327 U.S. at 266.

Bigelow was cited with approval in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 658, 697, n.7, 698 (1962), and later in Zenith Radio Corp. v. Hazeltine Research, Inc., supra. In Zenith, where the trial judge rather than a jury was the fact finder, the Supreme Court concluded that

> "*** the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pools' conduct and the claimed damage existed." 395 U.S. at 125.

Appellants in their brief argue the facts they intend to prove at trial in order to negate any proof or inference of causation offered by plaintiffs. Nothing in Judge Blumenfeld's decision of May 27, 1975 precludes appellants from introducing evidence intended to prove those facts nor from arguing their consequences to the jury. Perhaps the jury will agree with appellants. All the court below held was that the jury "may conclude" that plaintiffs have established causation "to each plaintiff".

The weakness and irrelevance of appellants' position is exemplified by the fact that this Court at this stage of the proceedings, has no way of reviewing whether the evidence that will be presented to the jury will be sufficient for a jury to infer the necessary causal connection between appellants' antitrust violations and appellees' damages. See Continental Ore Co. v. Union Carbide & Carbon Corp., supra., 370 U.S. at 700. That issue can only be resolved after trial, when the evidence can be reviewed.

C. THE TRIAL COURT PROPERLY CONCLUDED THAT THE DAMAGE ISSUES COULD BE TRIED SEPARATELY FROM THE LIABILITY ISSUE.

(1) The "Separate Trials" Order of the Court Below should be affirmed absent a clear showing of abuse of discretion.

The trial court's power to order separate trials is derived from Rule 42(b), Federal Rules of Civil Procedure, and is discretionary. Such an order will generally not be "set aside in the absence of a clear showing of abuse of discretion." Garber v. Randell, 477 F. 2d 711, 714 (2d Cir. 1973).*/

In Schine v. Schine, 367 F. 2d 685, 687 (2d Cir. 1966), Chief Judge Lombard characterized a district court's denial of motion for separate trial**/ as:

*/ In Garber v. Randell, supra, this Court recognized that Orders for separate trials are generally interlocutory and therefore not appealable under 28 U.S.C. §1291. 477 F.2d at 714-15. And if challenged in a petition for mandamus, Petitioner must show "exceptional circumstances or such gross abuse of discretion as to amount to action beyond the court's power." 477 F.2d at 715, n.2.

**/ In Schine, the motion requested the separate trial of a counterclaim from the plaintiffs' claim.

> "*** a matter of common, garden-variety district court housekeeping, an exercise of the district court's broad discretion in controlling the order of developing facts and issues at trial."

See also Idzojtic v. Pennsylvania Railroad Co., 456 F.2d 1228, 1230 (3d Cir. 1972).

(2) The District Court Did Not Abuse Its Discretion.

The motion by plaintiffs for separate trials on the issues of liability and damages was not made until after plaintiffs had completed the substantial portion of its discovery and at a time when the trial judge was fully familiar with issues for trial. Accordingly, the trial Judge's opinion was informed and based upon his detailed and extensive knowledge and understanding of the issues and contentions of the parties.

In antitrust actions, bifurcated trials on the issues of liability and damages are common and generally are a benefit to the defendants as well as to the court.

In Lo Cicero v. Humble Oil & Refining Co., 52 F.R.D. 28, 30 (E.D. La. 1971), (an antitrust action), the court recognized the benefits derived from separating the trial of liability from damages:

> " *** the jury may or may not reach a verdict for plaintiffs. There are sharp factual and legal disputes concerning the quantum of damages if a verdict is reached. Hence, the trial of the issue of damages at the same time as that of liability would lengthen the trial and involve complex additional jury instructions. ***"

The court concluded:

> " *** Separation of the damages issue promises convenience, potential economy, clearer jury understanding of the issues, less embrasive closing arguments, a shorter jury charge at each stage of the trial." 52 F.R.D. at 31

The Advisory Committee Notes to Rule 42(b) of the Federal Rules of Civil Procedure, 39 F.R.D. at 113, state:

> "While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth." [Emphasis added].

Judge Blumenfeld expressly found that separate trials of the liability and damages issues "is a common tool for dealing with complex litigation such as this," (App. 161A), and he further found that "separate trials will be more efficient than a single trial of both liability and damage issues." (App. 162A). Accordingly, there was no abuse of discretion.

Appellants' argument that they "will be forced through a 'liability' trial when it is highly unlikely damages can be demonstrated" (Appellants' Brief at p. 45) is a nonsequitur. Even assuming arguendo that plaintiff could prove no damages (an assumption vigorously disputed by plaintiffs and rejected by the trial court in denying defendants' motion for summary judgment */), a single trial of liability and damage issues together would save no time and effort on the part of the parties or the court. Appellants have not and indeed cannot suggest a more efficient method of trial. Their only suggestions are calculated to turn a manageable trial into what they hope will be an unmanageable one. Appellants should take heed of the preface of the Manual for Complex Litigation:

> "There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management."

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*/ (App. 83A et seq.). Appellants argument to this Court that plaintiffs will be unable to prove damages is nothing more than an attempt to seek review of the district court's denial of their summary judgment motion, an order not appealed from and, in any event, not appealable prior to trial. Clark v. Kraftco Corp., 447 F. 2d 933 (2d Cir. 1971); Alart Associates, Inc. v. Aptaker, 402 F. 2d 779 (2d Cir. 1968).

Appellants have opted for "inefficient procedures and management." In contrast, the trial court, in exercising its discretion in ordering separate trials, has opted for efficient procedures and management.

(3) The Trial Of The Damages Issues May Properly Be Heard By A Jury Different From The Jury Which Heard The Liability Issues.

There is no substance to appellants' argument that separate trials on liability and damages in these cases would unconstitutionally impair their right to jury trial, and the cases upon which they rely do not establish that proposition. United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9 Cir.), cert. denied 366 U.S. 924 (1961) involved a group of wrongful death and survivors' actions arising out of an airplane collision; the basis of the Court's holding that liability and damages could not be tried before separate juries was the circumstance that punitive damages were variously claimed in amounts depending directly on the "degree of culpability of the defendant" so that liability and damages were "interwoven" (286 F.2d at 306). But the damages in these cases in no way depend on the degree of the appellants' culpability once it is established that they

violated the antitrust laws. See Locklin v. Day-Glo Color Corp. 429 F.2d 873, 878 (7th Cir. 1970). And in Wiener the court expressly avoided considering whether separate juries could decide liability and damages respectively in other situations.

Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931), on which appellants rely, in fact recognized that separate issues appropriately can be tried before separate juries, stating that

> "Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not command a new trial of that issue even though another and separable issue must be tried again." 283 U.S. at 515.

Likewise, in Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir. 1975), the Court of Appeals for the Fifth Circuit upheld a damage verdict in an antitrust case in which the damages issue was tried separately on remand before a jury different from the one which heard and found liability. The Court ruled that "the issue on remand was properly limited to the issue of damages ***" and that:

> "In this connection, it was not error to instruct the jury as to the verdict reached by the first jury in the original trial of case on the monopolization issue." 509 F.2d 790. [Emphasis added].

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), is not in point at all, for it holds merely that a defendant in an antitrust suit cannot deprive plaintiff of a jury trial by first filing a declaratory judgment action seeking equitable relief. Beacon Theatres did not rule upon the issue of whether or not separate issues can be tried before separate juries, but held only that a party in an antitrust suit is entitled to a trial by jury on all the issues*/.

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*/ There is in Beacon Theatres a footnote, which is dictum, suggesting that because "the issue of violation of the antitrust laws often turns on the reasonableness of a restraint of trade in light of all the facts, *** it is particularly undesirable to have some of the relevant considerations tried by one factfinder and some by another." 359 U.S. at 508, n. 10. Of course, this dictum would not apply where there is a per se violation. Secondly, it would not apply where the issues are peculiarly distinct as they are in these cases.

Accordingly, the order of the court below relating to separate trials in no way infringes on appellants' rights to a jury trial. */

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*/ Rule 42(b), F.R.Civ.P., recognizes the propriety of separate trials for different issues. Rule 42(b) states, in part: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial *** of any separate issues *** or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." Indeed, F.R.Civ.P. 23(c)(4)(A) implicitly recognizes this principle by providing that a class action may be maintained "with respect to particular issues." The Local Rules of certain district courts specifically provide for separate trials for different issues before the same jury or different juries where appropriate: e.g., NDNY, Rule 41; N.D. Ill., Rule 21; M.D.N.C., Rule 23; W.D. Tex., Rule 25.

D. TRANSFER UNDER 28 U.S.C. §1404(a) AND CONSOLIDATION OF THE CASES IN THE DISTRICT OF CONNECTICUT WAS NOT AN ABUSE OF DISCRETION; APPELLANTS THEMSELVES URGED SUCH TRANSFER DURING THE EARLY STAGES OF THIS LITIGATION

The most mystifying position which appellants have taken in this appeal is their objection to transfer of all cases*/, under 28 U.S.C. §1404(a), to the District of Connecticut and for their consolidation. Perhaps more than any other action taken by appellants during the course of this litigation, their position on this issue exemplifies their strategy to sabotage the manageability of these class actions.

Appellants' position contra transfer and consolidation is mystifying for two reasons:

1) In 1970, appellants successfully moved for transfer under 28 U.S.C. §1404(a) of a case filed in the Northern District of Illinois. (App. 160A).

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*/ Except the cases commenced by the City of New York and the State of Florida, for whom no motion was made.

2) Also in 1970, appellants moved for transfer, under 28 U.S.C. §1404(a), of the two nationwide class actions filed in the Eastern District of Pennsylvania. City of Philadelphia v. Emhart Corporation, 317 F. Supp. 1320 (E.D. Pa. 1970). Judge Wood characterized appellants' position (at that time) in support of transfer as follows:

> "Also in support of their motion, the defendants urge that since as a matter of judicial economy, the class actions commenced in Illinois, New York and Philadelphia could be most efficiently litigated in one forum by one judge in charge of all cases, all of the aforementioned cases should be transferred to Connecticut. Moreover it is contended that the limited transfer for pre-trial matters provided for pursuant to 28 U.S.C. §1407 will not fully achieve the desired economy because the defendants will still be subject to the inconvenience of transporting witnesses and documents to many locations for separate trials." 317 F.Supp. at 1322.

What the district court has now done is to alleviate the very burdens about which appellants complained in their own motions to transfer - i.e., taken charge of the cases so that they can be litigated in one forum by one judge in one trial.

## CONCLUSION

In light of the foregoing, it is clear that the trial judge made his class action determination after acquiring intimate knowledge of the circumstances and issues involved in these cases and based upon his personal experience and observations throughout the pretrial procedures. He, who must manage the trial, concluded that the requirements of Rule 23 were met, that common issues predominated and that the administration and trial would be manageable.

Also based upon his knowledge of the issues, the trial judge ordered that separate trials be held for liability and damages respectively, concluding that it was the most efficient and fair method of adjudicating the claims. For the same reasons, he ordered transfer and consolidation of the cases for trial.

All of the foregoing was within the broad discretion of the trial judge. For each of his actions, he had ample support from the facts and circumstances known to him. Appellants have made no showing of abuse of discretion.

"Abuse of discretion" being the sole scope of review, plaintiffs-appellees respectfully urge that the Ruling on Pending Motions by the court below be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: :
: DOCKET NO. 75-7386
MASTER KEY ANTITRUST LITIGATION :

CERTIFICATE OF SERVICE

I, H. LADDIE MONTAGUE, JR., do hereby certify that I have on this 25th day of September 1975, mailed, postage prepaid, a copy of the forgoing REPLY BRIEF OF CERTAIN PLAINTIFFS-APPELLEES to counsel on the attached service list of counsel, and further I certify that I received by mail a copy of the BRIEF OF DEFENDANTS-APPELLANTS on September 18, 1975, postmarked [by meter mark] September 16, 1975.

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